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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN DUNGEY, Petitioner

v

UNITED STATES STEEL CORPORATION, Respondent

ON WRIT OF CERTIORARI TO THE

APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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To the Honorable William Rehnquist, the Chief Justice, and Associate Justices of the Supreme Court of the United States.

John Dungey, the petitioner herein, respectfully prays that a writ of certiorari issue to review the opinion and order of the Appellate Court of Illinois, Fifth District, entered in the above-styled case on September 30, 1986; petition for rehearing denied November 6, 1986; petition for leave to appeal denied by the Illinois Supreme Court on February 6, 1987.

QUESTION PRESENTED

Whether the Illinois Court deprived Petitioner John Dungey of his rights under the Jones Act, 46 U.S.C. §688 (1985), by rejecting the Fifth Circuit Court of Appeals standard for determining "seaman" status under the Act, and adopting and interpreting the Seventh Circuit standard to reverse the trial court's finding that Petitioner John Dungey was a "seaman".

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OPINIONS BELOW

The opinion and order of the Appellate Court of Illinois, Fifth District, is reported in Dungey v. United States Steel Corporation, 148 Ill.App.3d 484, 499 N.E.2d 545 (Ill.App. 1986), and is printed in the Appendix at page A-1. The order of the Appellate Court of Illinois, Fifth District, denying rehearing is unreported, and is printed in the Appendix at page A-38. The order of the Illinois Supreme Court denying leave to appeal is unreported, and is printed in the Appendix at page A-40. The opinion and order of the St. Clair County Circuit Court, Twentieth Judicial Circuit, Illinois is printed in the Appendix at page A-41.

JURISDICTION

The order of the Appellate Court of Illinois, Fifth District (Appendix A-1) was entered on September 30, 1986. A petition for rehearing was denied on November 7, 1986. (Appendix, page A-38) On February 6, 1987, the Illinois Supreme Court denied leave to appeal. (Appendix, page A-40) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(c)(1985).

STATUTE INVOLVED

The Merchant Marine Act, 46 U.S.C. §688 (1986):

§688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in

case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF CASE

This is an action brought pursuant to the Merchant Marine Act, 46 U.S.C. §688 (1985)(hereinafter "the Jones Act"). In August, 1982, petitioner John Dungey was employed by defendant U.S. Steel Company as an oiler on a crane barge, known as Ringer Barge #2. The Ringer Barge #2 consisted of two barges welded together, (R.1001) on top of which was mounted a crane. The barge was used to transport steel from various vessels onto the Jefferson Barracks bridge, which was then under construction in the Mississippi River between Missouri and Illinois. (R.49-50) The barge could move short distances through the use of winches and anchor lines, (R.67, 128) and the movement of spuds that ran through the corners of the barge and were imbedded in the river bottom. (R.65) At the time of plaintiff's accident, the barge was anchored in the Mississippi River. (R.651)

Petitioner's job as an oiler was to oil and grease the crane portion of the barge. (R.658) Thus, petitioner, along with an operating engineer, was required to remain on the barge all day long. (R.142) Two iron workers also worked on the barge at times. During the day, however, the iron workers would leave the barge to work on the actual construction of the bridge. (R.142) Petitioner and the other workers ate lunch on the barge, in a heated wooden shed. (R.1002)

On December 5, 1982, Ringer Barge #2 broke loose from its moorings, struck the bridge, and travelled several miles downstream. (R.931) The crane boom was severely damaged by its collision with the bridge, (R.931), so the crane was moved to shore for repairs. On December 30, 1982, the barge was repositioned in the river, and the boom was transported to the barge by tugboat. (R.937) In

preparation for fastening the boom to the Ringer Barge #2, petitioner began to clean the holes in the crane's boom carrier. (R.82) To do this, petitioner had to walk on the beams and girders without a safety belt or lifeline. He slipped and fell onto the deck of the barge. (R.671, 673, 963) An iron worker who arrived at the scene shortly after the accident testified that there was grease, oil and dirt on the girders and beams where plaintiff slipped. (R.1046) As a result of his fall, Petitioner sustained serious injuries to his neck, lower back, and right arm. (C.359)

Petitioner filed suit against Respondent United States Steel Corporation. His third amended complaint, filed April 22, 1985, contained two counts: a count under the Jones Act, 46 U.S.C. §688, alleging that defendant's negligence caused Petitioner's injuries; and a count under the general maritime law, in which

Petitioner claimed that the barge was an unseaworthy vessel. (C.397) Thus, the federal question involved in this cause -- the right of Petitioner to recover under the Jones Act, a federal statute -- was first raised at the pleadings stage in the trial court.

The conflicting standards in the United States Courts of Appeal for determining "seaman" status were first discussed by the trial court in ruling upon defendant's motion for a directed verdict at the close of plaintiff's case. (C. 377-386; R. 1082-1124) At that time, Judge Donovan adopted the broader standard first announced in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959). In reaching this decision, he made the following statements and findings:

> THE COURT: But the real thrust of your argument here is that he wasn't involved in the transportation of the vehicle? (sic)
>
> MR. BROOM: Or the navigation

of it.

THE COURT: Or the navigation or transportation?

MR. BROOM: Correct, and I don't think there's any argument about that really.

THE COURT: No, I don't think there is.

. . .

THE COURT: Do you want me to rule on this? I will. I should, just so we can move ahead. My opinion is that if I were to follow Johnson I think these facts are similar to Johnson and - would result in a directed verdict. I am not following Johnson, I'm following -- If this goes to the Appellate Court, they can make up their minds, but I, I think the Tullos decision and the Robinson decision are more in line with United States Supreme Court than the Johnson decision. (R.1116, 1117, 1123, 1124)

The trial court again adopted the Robison standard in his final order, in which he entered judgment for Petitioner in the amount of $650,000.00. (Appendix, page A-41)

The federal question of plaintiff's

rights under the Jones Act, and the proper standard for determining such rights, was timely presented to the Appellate Court of Illinois, Fifth District, as it was briefed thoroughly by both parties. The Appellate Court reversed the decision of the trial court, applying the more narrow standard announced in Johnson v. John F. Beasley Construction Company, 742 F.2d 1054 (7th Cir. 1984), cert. denied 469 U.S. 1211 (1984) to determine that Petitioner was not a seaman (Appendix, page A-1).

The court denied a petition for rehearing (Appendix, page A-38). The Illinois Supreme Court denied a petition for leave to appeal (Appendix, page A-40). Petitioner has no other remedies or methods of review in Illinois.

REASONS FOR GRANTING WRIT

I. PETITIONER HAS BEEN SUBSTANTIALLY DEPRIVED OF HIS RIGHTS UNDER THE MERCHANT MARINE ACT, 46 U.S.C. §688 (1985), BY THE ILLINOIS COURT'S REJECTION OF THE PREVAILING FEDERAL STANDARD FOR DETERMINING "SEAMAN" STATUS, AND ITS APPLICATION OF THE MINORITY STANDARD TO DETERMINE THAT PETITIONER WAS NOT A SEAMAN WITHIN THE MEANING OF THE ACT.

This Court should grant this petition for writ of certiorari because the decision of the Illinois court below has deprived Petitioner of his rights under the Merchant Marine Act, 46 U.S.C. §688 (hereinafter "the Jones Act"). Furthermore, the decision of the Appellate Court conflicts with decisions by this Court interpreting the application of the Jones Act and emphasizes conflicting standards in the United States Courts of Appeal. This Court should therefore issue a writ of certiorari in this case to promote the uniform application of the Jones Act and maritime law throughout the United States, in compliance with this Court's

previous decisions.

The Jones Act provides that a "seaman" who suffers personal injuries during the course of his employment may maintain an action for damages at law to recover for his injuries. 46 U.S.C. §688. The establishment of a person's status as a seaman governs his right to sue not only under the Jones Act, but under the general maritime law as well. At issue before the Court in this case is the proper definition of "seaman", a term which has been a frequent source of litigation.

The federal courts have taken two different approaches in determining seaman status. The Fifth Circuit Court of Appeals in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) announced a liberal standard, which has been applied by a number of courts since 1959, and which was adopted by the trial court in this cause. The Seventh Circuit Court of

Appeals, however, in Johnson v. John F. Beasley Construction Company, 742 F.2d 1054 (7th Cir. 1984), cert. denied 469 U.S. 1211 (1984), recently adopted a more restrictive standard, which was applied by the Appellate Court of Illinois to reverse the decision of the trial court and deny recovery to Petitioner.

The Appellate Court held that a person is a seaman only if his duties make "a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." Dungey v. United States Steel Corporation, 148 Ill.App.3d 484, 492, 499 N.E.2d 545, 552 (1986)(quoting Johnson, 742 F.2d at 1063).

In reaching this decision, the Appellate Court expressly rejected the majority approach first set forth by the Fifth Circuit Court of Appeals in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959). In Robison, the Court,

relying on the liberal policy of protection underlying the Jones Act, and attempting to reconcile United States Supreme Court decisions on the matter, held that a person was a seaman "if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission." Robison, 266 F.2d at 779.

The Johnson standard, as adopted and applied by the Appellate Court in this cause, is contrary to United States Supreme Court decisions discussing "seaman" status. A review of Supreme Court decisions shows that this Court has adopted a broad definition of "seaman", and has shown a tendency to expand upon the application of the Jones Act. In South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, (1940), the Court announced the requirement that seamen be "naturally and primarily aboard to aid in navigation".

This criterion, upon which the Court in Johnson relied heavily, has been somewhat relaxed throughout the years. See Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1070 (5th Cir. 1986). In Norton v. Warner Co., 321 U.S. 565 (1944), the Court held that a barge worker was a seaman. In reaching this decision, they noted that

> navigation is not limited to 'putting over the helm'. . . . '[E]veryone is entitled to the privileges of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage'.

Norton, 321 U.S. at 572, (quoting The Buena Ventura, 243 F.2d 797, 799 (D.C.N.Y. 1916)).

This Court, in later cases, continued to apply a broad interpretion of "seaman". Gianfala v. Texas Co., 350 U.S. 879, (1955), appears to be directly controlling over the present case. In Gianfala, a member of a drilling crew aboard a

submersible drilling barge was killed while unloading drilling pipe onto the barge. At trial, the jury found for plaintiff after the Court denied defendant's motion for a directed verdict based on plaintiff's status as a seaman. The Fifth Circuit Court of Appeals reversed, holding that, as a matter of law, decedent was not aboard primarily to aid in navigation. They stated that plaintiff was not a member of the ship's crew, but was a member of the drilling crew, and performed only work done by oil field workers. The Supreme Court, without discussion, remanded the case to the trial court for reinstatement of the original judgment. Gianfala, 350 U.S. at 879.

Similarly, in Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, (1958), in a short per curiam opinion, the Court found that a pile driver assisting in the erection of a "Texas Tower", a radar

station at sea, might be a seaman. In Butler v. Whiteman, 356 U.S. 271, (1958), another per curiam opinion, the Court held that a man who performed odd jobs around the defendant's wharf, barge and tug might be a seaman even though the tug had been out of navigation for several months before the accident, and the accident occurred ashore.

This Court has not actually considered the question of seaman status since these 1958 decisions. In 1985, however, in Herb's Welding, Inc. v. Gray, 105 S. Ct. 1421 (1985), the Court considered whether workers engaged in oil production activities aboard stationary platforms were covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., §§ 901 et seq. (1927)(hereinafter "LHWCA"). The LHWCA provides coverage to longshoremen and harbor workers, and not to masters or members of the crew of a vessel. Swanson

v. Marra Bros., Inc., 328 U.S. 1 (1946). A seaman has been identified as one who is a master or member of the crew of the vessel under the LHWCA. Swanson, 328 U.S. at 1; Senko v. LaCrosse Dredging Co., 352 U.S. 370 (1957). The LHWCA therefore narrows the scope of the Jones Act, see International Stevedoring Co v. Haverty, 272 U.S. 50 (1926), so that the courts may look to cases under the LHWCA to determine whether a person is a seaman. See Ardoin v. J. Ray McDermott & Co., 641 F.2d 277 (5th Cir. 1981).

In discussing the status of oilfield workers, the Court in Herb's Welding noted:

> Floating structures have been treated as vessels by the lower courts. Workers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen. Herb's Welding, 105 S.Ct. at 1424, n. 2. (citations omitted).

These cases clearly indicate that "seaman" is to be defined to allow recovery not only to those traditionally considered seaman, but to all those who are permanently assigned to vessels, and who work to further the purpose or function of that vessel. The standard announced in Robison, 266 F.2d 769 (1959), was adopted by the Court as an attempt to reconcile these Supreme Court decisions with the previously stated law, and clearly reflects the Supreme Court's interpretation of "seaman".

The Johnson standard, as applied by the Appellate Court of Illinois, Fifth District, is not consistent with the decisions cited above, and deprives Petitioner of his rights under the Jones Act. The facts and circumstances of Petitioner's employment are virtually indistinguishable from those of the injured plaintiffs in Gianfala, 350 U.S. at 879,

and Grimes, 356 U.S. at 252. The plaintiffs in Gianfala and Grimes were both, like Petitioner, aboard vessels designed for specific purposes. Their duties, like Petitioner's, were directed solely toward the special purpose of the vessel. The plaintiffs in Gianfala and Grimes, however, unlike Petitioner, were held to be seamen, and thus entitled to recovery under the Jones Act and general maritime law. The lower court's decision in this case, conflicting as it does with the law established by this Court, must not be allowed to stand. Rather, the Johnson standard applied by the lower court must be rejected as an improper deprivation of Petitioner's rights under the Jones Act.

In emphasizing the transportation function of the vessel in its interpretation of "seaman", the Johnson Court has focused on the Supreme Court's early pronouncement that seamen are those

aboard "primarily to aid in navigation". See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). They have, however, disregarded the decisions of the Court, and its later pronouncements, which clearly indicate that persons who contribute to the operation and welfare of the vessel are entitled to seaman status. See Norton v. Warner Co., 321 U.S. 572 (1944). The standard applied by this Court in the past must not now be changed to deny recovery to injured persons.

The narrow definition of "seaman" adopted by the Johnson Court and the lower court in this case also conflicts with the overwhelming majority of cases interpreting "seaman". The Fifth Circuit Court of Appeals, the preeminent jurisdiction for Jones Act cases and other maritime law, first adopted the standard of Offshore Co. v. Robison, 266 F.2d 769 (1959). Since that time,

Robison has been cited with approval approximately one hundred times, and has been relied on in innumerable unpublished opinions. See Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986)(reaffirming Robison, 266 F.2d at 769 and expressly rejecting Johnson, 742 F.2d at 1054). Indeed, the Fifth District Appellate Court of Illinois, the Court which reversed the judgment in the instant cause, cited Robison with approval only three years ago. See Berry v. American Commercial Barge Lines, 114 Ill.App.3d 354, 450 N.E.2d 436, 71 Ill.Dec.1 (Ill.App. 1983). For more than twenty-five years, since 1959, the vast majority of Jones Act and maritime cases have been decided under the Robison standard. The lower court in this case even noted that Robison has been "considered the seminal case in answering what has been referred to as the "riddle" of who is a Jones Act

"seaman". Dungey v. United States Steel Corporation, 148 Ill.App.3d at 489, 499 N.E.2d at 548. The Supreme Court has signalled no disapproval of Robison. Barrett, 781 F.2d at 1074. Neither has Congress seen fit to amend the Jones Act to more narrowly define "seaman", though the Act was amended in 1982 with regard to foreign seamen. See 48 U.S.C., Sec. 688(b)(1982). Robison is still the law in the Fifth Circuit, and should be the law throughout the United States, as it has clearly withstood the test of time.

In Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1070 (5th Cir. 1986), the Fifth Circuit considered, and expressly rejected the Johnson standard for the reasons discussed above. Most maritime litigation occurs in the Fifth Circuit. Dungey, 148 Ill.App.3d at 491, 499 N.E.2d at 550. Claims brought under the Jones Act are not litigated frequently in the

Seventh Circuit. Johnson, 742 F.2d at 1056. It would be both inequitable and contrary to prior Supreme Court law for this Court to adopt the minority Johnson standard. This Court, however, should adopt one of the two prevailing standards. Unless this Court adopts a standard for the determination of "seaman" status, uniform a plaintiff's status as a seaman could change as his location on the Mississippi River changes. Clearly, Congress did not intend for the law to be applied in such a disparate manner. The Johnson standard must therefore be rejected by this Court.

The Johnson Court adopted the "transportation function" test in an effort to create a bright line test and abolish inconsistencies in the interpretation of "seaman". Johnson, 742 F.2d at 1054. As the dissent in the instant case, however, shows, this test is still not absolute. Furthermore,

the portion of the Robison standard changed by Johnson -- whether the employee contributed to the function of the vessel or the operation of its mission -- is, by its nature, easily ascertained. Barrett, 781 F.2d at 1073. Inconsistencies exist because of different definitions of "vessel" and "vessel in navigation". These inconsistencies will not be abolished by the adoption of the Johnson standard, but may actually be increased. Application of Johnson, may, for example, lead to cases in which structures regularly regarded as vessels suddenly have no crew members or seamen at all.

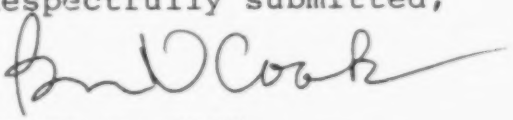
Finally, this Court should adopt the Robison standard because underlying the Jones Act, 48 U.S.C., Sec. 688, is the liberal policy of providing recovery to injured seamen. In keeping with this remedial purpose, the Act should be, and has been, interpreted broadly. See Berry v. American Commercial Barge Lines,

114 Ill.App.3d 354, 450 N.E.2d 436, 71 Ill.Dec.1, 7 (Ill.App. 1983)(listing cases in which personnel such as hairdressers, and waitresses have been found to be seamen). The Johnson Court, and the Appellate Court in this cause, now attempt to unduly and inequitably narrow the commonly accepted reading, without direction from Congress or this Court. This should not, and cannot be allowed to happen. The Johnson standard is an anomaly, and this Court must clearly show that Illinois cannot reject Supreme Court decisions, and can not allow its injured seamen to be afforded less protection than seamen injured in the rest of the country.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,



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APPENDIX

No. 5-85-0377

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOHN DUNGEY,	)	Appeal from the
	)	Circuit Court of
	)	St. Clair County.
Plaintiff-Appellee,	)	
Cross-Appellant,	)	
vs.	)	No. 83-L-128
UNITED STATES STEEL	)	
CORPORATION,	)	Honorable
Defendant-Appellant	)	James K. Donovan,
Cross-Appellee.	)	Judge Presiding.

MR. JUSTICE KARNS delivered the opinion of the court:

Plaintiff, John Dungey, brought suit against defendant United States Steel Corporation, under the Merchant Marine Act of 1920 (46 U.S.C. §688) commonly

known as the Jones Act, and under the general maritime law of the United States, in the Circuit Court of St. Clair County to recover damages for personal injuries received in the course of his employment. After a trial before the court sitting without a jury, judgment was entered in favor of plaintiff. Both parties appeal.

Plaintiff was a member of Operating Engineers Local No. 520; he was employed by defendant as an oiler on a crane, mounted on two barges, welded together, which served as a floating work platform situated in the Mississippi River at the site of the construction of the Jefferson Barracks Bridge across the river in south St. Clair County, Illinois, connecting the states of Missouri and Illinois. Plaintiff's only duties were in connection with the oiling and greasing of the crane which was used to set structural steel in the construction

of the bridge.

The crane was designed to move in a 360 degree circle and was referred to as a ringer crane. It was mounted on girders and beams welded to the deck of the barges. The platform on which the crane rested had no motive power, and when moved for any considerable distance, the use of a tugboat was required. Limited movement of the barge was possible by the use of winches which secured the anchor lines which positioned the barge in the river, and the movement of spuds that ran through the corners of the barge and were imbedded in the river bottom. Structural steel and supplies were transported to the platform by tugboat. Plaintiff had no duties associated with movement of the barge and was transported as a passenger morning and evening to and from the crane platform by tugboat. At noontime, the crew, consisting of the crane operator, some

ironworkers, a mechanic and plaintiff remained on the platform and took their meals there. Plaintiff sometimes cooked for the men on facilities available in the heated work shed located on the deck.

On December 5, 1982, prior to plaintiff's accident, the platform broke loose from its moorings, struck the bridge, damaging the crane, and was propelled by the river current several miles downstream. The crane boom was severely damaged, and the barge was moved to shore by tugboat so that the crane could be repaired and rebuilt. Plaintiff was then assigned, along with members of other crafts, to a "bull gang" to repair the crane ashore.

After the crane was repaired, the barge platform was repositioned in the river and the boom was transported to the barge by tugboat. On December 30, 1982, the ironworker foreman assigned plaintiff the task of cleaning out the

holes in the boom through which steel pins are inserted to connect the sections of the boom together and to the crane. Plaintiff used sandpaper, a brush and a grease gun to perform this task. While moving from one side of the boom to the other, plaintiff testified that he slipped on frost, fell from the girders which supported the ringer crane on the barge and onto the deck of the barge. A witness testified that grease and oil had accumulated on the girders and beams.

After a trial before the court, the court having denied defendant's jury demand because of late payment of the $50 jury fee required to be paid under section 27.1(4) of the Act relating to Clerks of Courts (Ill. Rev. Stat. 1983, ch. 25, par. 27.1(4)), which was tendered after the cause was placed on the non-jury calendar, the court entered judgment for plaintiff for $650,000 and denied plaintiff's request for prejudgment

interest, a ruling from which plaintiff has cross-appealed.

While numerous errors are relied upon by defendant for outright reversal or the award of a new trial, we conclude that the determination of plaintiff's status as a seaman is dispositive of this appeal; accordingly, we need not address the other errors relied on for reversal or the issue raised in plaintiff's cross-appeal.

In determining plaintiff's status as a seaman, we are, of course, governed by the federal law developed in the cases decided under the Jones Act and the general maritime law. (Alton & Southern Ry. Co. v. Alton Transp. Co. (5th Dist. 1980), 79 Ill.App.3d 591, 399 N.E.2d 173.) The establishment of plaintiff's status as a seaman governs his right to sue both under the Jones Act and under the general maritime law for unseaworthiness.

The determination of seaman status

has been the subject of extensive litigation and is further complicated by the divergence of opinion as to the proper test to be employed in answering this question, developed in the case law in the courts of the United States Courts of Appeal where most maritime litigation occurs. Furthermore, the Supreme Court of the United States has last spoken to this subject in two per curiam opinions in 1958 (Butler v. Whiteman (1958), 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754; Grimes v. Raymond Concrete Pile Co. (1958), 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737), and the prior decisions of the Supreme Court, many per curiam, are not particularly helpful in resolving this question. These decisions are reviewed at length in Offshore Co. v. Robison (5th Cir. 1959), 266 F.2d 769, considered the seminal case in answering what has been referred to as the "riddle" of who is a Jones

Act "seaman."

The Jones Act gives to seamen the right to sue their employers for injuries occasioned by negligence. The Act does not define who is a seaman. A seaman has been identified as one who is a "master or member of the crew of a vessel" as those terms are used in the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHWCA"; 33 U.S.C. §901 et seq. (1927)), as that act only provides coverage to longshoremen and harbor workers and not to masters or members of the crew of a vessel. (Swanson v. Marra Bros. Inc. (1946), 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045; Senko v. LaCrosse Dredging Co. (1957), 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404.) In other words, the LHWCA narrows the original scope of the Jones Act (See International Stevedoring Co. v. Haverty (1926), 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157) so that a seaman is one who is a member

of the crew of a vessel, the terms being synonymous, and we may look to cases decided under the LHWCA to determine who is a seaman. (Ardoin v. J. Ray McDermott & Co. (5th Cir. 1981), 641 F.2d 277.) As noted in Ardoin, the phrase member of the crew is only slightly more illuminating than the word seaman.

In the early case South Chicago Coal & Dock Co. v. Bassett (1940), 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732, the Supreme Court addressed the question whether plaintiff, a laborer who drowned, was a "member of the crew" and, therefore, not covered under the LHWCA. Decedent worked as a deckhand aboard a lighter directing the flow of coal from the lighter to the vessel being fueled. He threw lines but performed no navigational duties; he occasionally did some cleaning of the boat; he held no maritime articles and slept and boarded off the boat. The court decided that decedent's status

as a "member of the crew" was a factual question to be determined in the first instance by the administrative procedure provided under the LHWCA. The finding of the deputy commissioner, if there was evidence to support it, was conclusive and final. Quoting from an early case, the court said, "'[w]hen the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the arrangement under which they are on board.'" (Emphasis added.) (309 U.S. at 259, 60 S.Ct. at 548, 84 L.Ed. at ___.) The court reasoned that while decedent might be classified as a "seaman," he was distinct from a member of a "crew" and was, therefore, excluded from coverage under the Jones Act. The court concluded that there was evidence to support the administrative finding awarding compensation under the LHWCA.

Following the decision of the Supreme Court in South Chicago Coal & Dock Co. v. Bassett, the First Circuit decided Carumbo v. Cape Cod S.S. Co. (1st Cir. 1941), 123 F.2d 991. Based on South Chicago Coal & Dock Co., the court held that the test to be applied in determining seaman status under the Jones Act involved three factors: (1) that the vessel be in navigation; (2) that plaintiff have a more or less permanent connection with the vessel; and (3) that plaintiff be aboard primarily to aid in navigation. We are here concerned only with the third factor.

This test was employed by other circuits, although, the application of the test to the navigational duties performed by the injured plaintiff were not always clear (see e.g. Wilkes v. Mississippi River Sand & Gravel Co. (6th Cir. 1953), 202 F.2d 383; McKie v. Diamond Marine Co. (5th Cir. 1953), 204 F.2d

132.) The same test has been adopted by this court in Berry v. American Commercial Barge Lines (5th Dist. 1983), 114 Ill.App.3d 354, 450 N.E.2d 436, where we reviewed a number of cases dealing with the status of the injured plaintiff as a seaman.

The cases emphasize that only where the evidence is clear and admits of but one conclusion can the question of seaman status be decided as a matter of law as the Act is to be given a liberal construction. "Except in cases where the underlying facts are undisputed, and the record reveals no evidence from which reasonable persons might draw conflicting inferences about these facts, the riddle of seaman's status is one for the jury." Ardoin v. J. Ray McDermott & Co. (5th Cir. 1981), 641 F.2d 277, 280.

The case followed by the trial court in reaching its decision that plaintiff

was a seaman and member of the crew of the work barge is Offshore Co. v. Robison (5th Cir. 1959), 266 F.2d 769, cited with approval in Tullos v. Resource Drilling, Inc. (5th Cir. 1985), 750 F.2d 380, also relied on as authority by the trial court. The plaintiff, Robison, was employed as a "roughneck" in the offshore petroleum industry in the Gulf of Mexico. He was injured while working as a driller's helper on a drilling rig mounted on a drilling platform resting on the bottom of the Gulf of Mexico on retractable legs. The rig was moved as a barge to its location by tugs. While moving as a barge, employees such as Robison would customarily chip rust, paint and handle lines. When injured, Robison was working with drilling casing. He sued under the Jones Act and the general maritime law.

The test for seaman status developed in Robison, and repeated in numerous

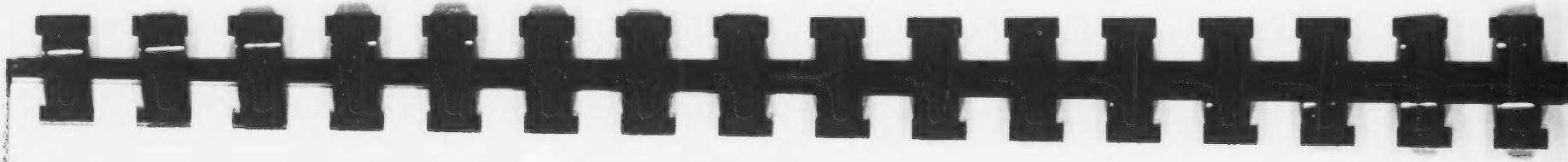
Jones Act cases, often involving injuries to workmen in the offshore petroleum industry, states that there is a submissible case for the trier of fact's consideration:

> "(1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." (266 F.2d at 779.)

It will be observed that the Robison test for determining seaman status ignores the language "primarily in aid of navigation," the test advanced in South Chicago Coal & Dock Co. v. Bassett, which the Fifth Circuit had earlier adopted in McKie v. Diamond Marine Co. (5th Cir. 1953), 204 F.2d 132.

In Robison, recently reaffirmed in Barrett v. Chevron, U.S.A., Inc. (5th Cir. 1986), 781 F.2d 1067, the court discarded the "aid to navigation" test as largely meaningless. The court stated that after examining numerous cases, "recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation and is a member of the ship's company only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured." (266 F.2d at 780.) The result of the adoption of

the Robison test is that in almost any setting the determination of seaman status under the Jones Act is a factual question for the jury to decide. (See Pickle v. International Oilfield Divers, Inc. (5th Cir. 1986), 791 F.2d 1237, involving an underwater diver welding a brace on a fixed diving platform.) Robison may be distinguished from the instant case in that Robison's duties aboard the drilling platform, capable of floating as a vessel, unlike Dungey's duties here, "contributed to her mission, to the operating function she was designed to perform as a sea-going drilling platform. Some of Robison's duties had a 'significant navigational function,' like Senko's [Senko v. LaCrosse Dredging Corp. (1957), 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404] in that they related to the seaworthiness, maintenance (welfare) of Offshore No. 55. Some of his duties * * * are traditional duties of seamen



in that they related to the movement of the vessel as a means of transport on water." 266 F.2d at 779.

In Senko v. LaCrosse Dredging Corp. (1957), 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404, cited in Robison, petitioner was a handyman employed on a dredge building a by-pass canal on the Mississippi River. He carried supplies and performed general maintenance on the floating dredge. He was injured ashore while in the work shed, where he had gone to store signal lanterns, when a coal stove in the shed exploded. The petitioner's chores included cleaning the deck of the dredge, splicing rope and stowing supplies, taking soundings and cleaning navigational lights when the dredge was in transit. The court concluded that the jury could find that petitioner was responsible for the seaworthiness of the dredge and was employed on the dredge as a member of the crew. The fact that he was injured

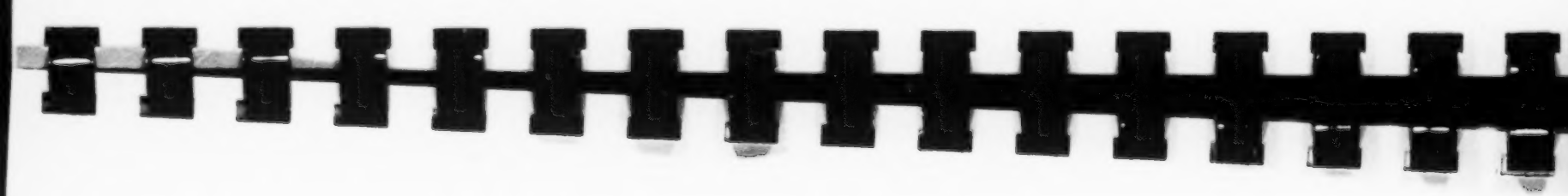
on land was not material. He had "a significant navigational function when the dredge was put in transit." 352 U.S. at 374, 77 S.Ct. at 418, 1 L.Ed.2d at ___.

The Fifth Circuit's test of seaman status would appear to be an outgrowth of the Supreme Court's per curiam reversal of an earlier case where it was determined as a question of law on almost identical facts that a member of a drilling crew on an offshore oil rig was not a seaman. Gianfala v. Texas Company (1955), 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775, rev'ing Texas Company v. Gianfala (5th Cir. 1955), 222 F.2d 382.

The four cases cited by the Supreme Court in its per curiam reversal shed little light on the question of the proper test to determine status as a seaman and are noted as follows:

South Chicago Coal & Dock Co. v. Bassett (1940), 309 U.S. 251, 60 S.Ct.

544, 84 L.Ed. 732, held only that the deputy commissioner's administrative determination that a deckhand aboard a lighter, assisting in the flow of coal to the vessel being fueled, was not a member of the crew and accordingly was entitled to compensation under the LHWCA was supported by the evidence; Summerlin v. Massman Const. Co. (4th Cir. 1952), 199 F.2d 715, held without analysis or detailed discussion of the facts that a jury question is presented as to the seaman status of a worker employed as a fireman on a floating derrick used in the construction of a bridge on the York River in Virginia; Wilkes v. Mississippi Sand & Gravel Co. (6th Cir. 1953), 202 F.2d 383, held that it was a jury question whether laborers employed and living aboard a gravel dredge in the Mississippi River aided in the navigation of the vessel and were therefore seamen when they contributed to the



operation and welfare of the vessel; Gahagan Const. Corp. v. Armao (1st Cir. 1948), 165 F.2d 301, held that a jury could find that an employee on a dredge in Boston Harbor was a seaman, a seaman being one who does any work aboard a ship in navigation, and also a member of the crew as he performed chores in aid of navigation of the vessel.

Professors Gilmore and Black observe:

> "[w]ho else might be excluded (or included) was, as a matter of initial construction, impossible to say. After a half-century of litigation the answer to the riddle is not apparent. The Supreme Court has alternated between giving the term 'seaman' an exceedingly broad construction and giving it a much narrower one. Consequently defendants have been encouraged to argue, in all but the most obvious cases, that plaintiff is not a Jones Act

seaman and that the action must be dismissed. Thus there has always been, there continues to be, and presumably there will go on being a substantial volume of depressing litigation of this type." G. Gilmore & C. Black, The Law of Admiralty, §6-21 at 328 (2d ed. 1975).

Even in the Fifth Circuit, however, where most of the litigation involving seaman status has occurred, there has been considerable inconsistency in the cases. (Cf. Barrios v. Louisiana Construction Material Co. (5th Cir. 1972), 465 F.2d 1157 with Cook v. Belden Concrete Products, Inc. (5th Cir. 1973), 472 F.2d 999.) Professors Gilmore and Black in their excellent treatise on admiralty law conclude that "[e]ven in a Circuit as steeped in admiralty law as the Fifth, the plaintiff's fate, in cases of this sort, seems to depend on the luck of the judicial draw." G. Gilmore and C.

Black, The Law of Admiralty, §6-20 at 334 (2d Ed. 1975).

Recently, the Seventh Circuit decided Johnson v. John F. Beasley Construction Co. (7th Cir. 1984), 742 F.2d 1054, cert. denied ___ U.S. ___, 105 S.Ct. 1180, 84 L.Ed.2d 328. On operative facts indistinguishable from those present here, the court decided that Johnson, an ironworker, was not a seaman. Johnson was employed by defendant, a structural steel contractor, to work in the removal of a "swing" span of a railroad bridge over the Illinois River and replace it with a "lift" span. Plaintiff was a foreman in charge of the crew performing the work. Plaintiff was transported daily by tug to a barge used as a work platform in the river channel which supported a large crane used in the construction project in the removal and erection of structural steel. The barge had no motive power, but unlike the barge

employed here, it was moved by tug downstream where construction material would be loaded aboard it from supply trucks on shore by the use of the crane, and thus clearly was a "vessel in navigation." On such occasions, plaintiff would assist in the loading and would handle lines.

While plaintiff was supervising the construction of a control house on the bridge, the tugboat collided with a beam on the barge which turned and came in contact with Johnson's leg, causing a severe injury requiring the amputation of the leg. As here, plaintiff received Illinois Workers' Compensation benefits and subsequently brought suit in the district court to recover under the Jones Act.

In reviewing the development of the law under the Jones Act, the court first noted that the case law had not developed a uniform or consistent

interpretation of the term "seaman." The court stated that while it found the opinion in Robison

> "a well-reasoned attempt to extract relevant principles from then-existing case law, *** we think that its restatement of the third prong of the traditional test (that the employee's duties must be primarily in aid of navigation), *** is too broad in that it accords insufficient weight to the relationship between the employee and the transportation function of the vessel. More specifically, we think the second part of the Robison test strays from important Jones Act principles when it speaks of the employee's duties as having to relate only to the 'function of the vessel or the accomplishment of its mission' without further qualifying 'function' and 'mission' in terms of the vessel."

742 F.2d at 1061.

The court attributed the Robison's court's failure to consider the employee's duties in relation to the transportation function of the vessel to the court's attempt to determine the reasoning of the Supreme Court in several earlier per curiam opinions. Johnson interpreted Senko as holding that the employee must have significant navigational functions before he can be considered a Jones Act seaman and a member of the crew of a vessel. Because a vessel must function in the transportation of personnel or materials across navigable waters (Powers v. Bethlehem Steel Corp. (1st Cir. 1973), 477 F.2d 643, 647), the employee's duties must relate to the transportation function of the vessel.

The Johnson court reasoned that the interpretation of "seaman" in Robison was intended to give reasonable protection to workers in the offshore oil industry,

but "while such categories of workers previously may have fallen through the cracks of existing compensation schemes, they are now protected through the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(b), which incorporates the coverage of the LHWCA." 742 F.2d at 1062.

Notwithstanding that it may be appropriate to find seaman status when the employee's duties fall into what the court characterized as "gray areas," the court stated that it distorts the purpose of the Jones Act "when persons who are obviously not seamen recover damages at the ship owner's expense. If the Jones Act is to retain any limitation on its coverage, we believe the employee's duties with respect to the transportation function of the vessel should define them." 742 F.2d at 1062.

The court concluded that there is an evidentiary basis for submitting to the jury the question of the injured

party's status as a seaman if:

> "(1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." 742 F.2d at 1063.

In applying this test to the facts of the case, the court held that there was no evidentiary basis for submitting the case to the jury because the only evidence suggesting that plaintiff was a seaman or member of the crew was the statement that he may have handled mooring lines; this the court found to be insignificant with respect to the transportation function of the barge.

In the case before us, in ruling on defendant's motion for directed verdict, the trial court acknowledged that if it were to follow Johnson, no evidence

suggested that Dungey had anything to do with the transportation function of the work barge or the tug that transported the workmen and moved the barge in position in the river and that defendant would be entitled to a directed verdict. The court made it clear, however, that it was following Robison and the test adopted in the Fifth Circuit and that a fact question was presented as to plaintiff's status as a seaman because there was evidence that his duties contributed to the function of the vessel or to the accomplishment of its mission as a work barge or floating work platform.

In Barrett v. Chevron, U.S.A., Inc. (5th Cir. 1986), 781 F.2d 1067, the court reconsidered, en banc, the test for seaman status developed twenty-six years earlier in Robison. Barrett was injured while working as a member of a welding crew in repairing the caisson of a producing offshore oil well. Because of the small

size of the platform, the work was largely performed from a barge positioned alongside the caisson where plaintiff spent most of his time in fabricating new pipe sections to be welded onto the caisson. The workers were transported daily to the worksite by crew boat from living quarters provided on a fixed platform. Barrett injured his back while being transported from the crew boat to the work barge in a personnel basket by the use of a crane on the barge. He continued to work, however, and claimed his injury was aggravated the following day while lifting a heavy piece of pipe on the work barge. Plaintiff sought damages under the Jones Act and general maritime law for negligence and unseaworthiness.

In Barrett, the court once again reviewed the development of the law, often expressed as the "riddle" of seaman status, observing that the last attention given this question by the Supreme Court

was in two brief per curiam opinions in 1958. (Butler v. Whiteman (1958), 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754; Grimes v. Raymond Concrete Pile Co. (1958), 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737.) The court affirmed its adherence to the test formulated in Robison, rejecting the test advanced by the Seventh Circuit in Johnson, observing that Robison had stood the test of time, had been cited more than 95 times and was considered the leading case on the subject. In applying another part of the Robison test, however, the court found the evidence insufficient to support a finding that Barrett was a member of the crew of the work barge. In the context of his entire employment, he performed 70% to 80% of his work on fixed platforms, not barges, hence was not a member of the crew of a vessel or fleet of vessels.

In a special concurrence, four judges

opted to adopt the rule of Johnson v. John F. Beasley Construction Co. approving of the reasoning of the Seventh Circuit as expressed in its opinion and stating, "[a] bright-line rule is called for, one that nudges coverage back toward the blue-water sailors for whom the Jones Act was meant." 781 F.2d at 1067.

We assume for the purpose of this disposition that a fact question is here presented by the evidence as to Dungey's status as a seaman and member of the crew of the work barge on which he was injured should we adopt the Robison test. We choose, however, to adopt the test promulgated by the Seventh Circuit in Johnson as more logical and reasonable and one capable of rational and consistent application. It simply seems illogical that an essentially land-based worker, an oiler, a member of the operating engineers union, whose only duties were the oiling of the crane situated on the

barge and subsequent repair of the boom of the crane after it was damaged, could be considered a seaman and member of the crew of a vessel. He performed no work in connection with the transportation function of the barge, which we here assume to be a vessel in navigation.

We are further persuaded to adopt the Johnson test for seaman status for another reason. The United States district courts sitting in Illinois would be obliged to follow Johnson, there being no contrary holding of the United States Supreme Court which would be binding on all inferior federal courts. (Powell v. United States (7th Cir. 1964), 338 F.2d 556; Shakman v. Democratic Organization of Cook County (N.D. Ill, 1972), 356 F.Supp. 1241, 1246.) It would be anomalous that different rules for determining seaman status would turn on whether a cause was filed in the federal district courts in Illinois or in the Illinois

circuit courts, there being concurrent jurisdiction in actions arising under the Jones Act. Engel v. Davenport (1926), 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813; 46 U.S.C. §688; 45 U.S.C. §§51,56.

We choose to adopt the reasoning of Johnson v. John F. Beasley Construction Co. (7th Cir. 1984), 742 F.2d 1054. Accordingly, the judgment of the Circuit Court of St. Clair County is reversed.

REVERSED.

KASSERMAN, P.J., concurs.

Filed September 30, 1986

No. 5-85-0377

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOHN DUNGEY,	)	Appeal from the
	)	Circuit Court of
	)	St. Clair County.
Plaintiff-Appellee,	)	
Cross-Appellant,	)	
vs.	)	No. 83-L-128
UNITED STATES STEEL	)	
CORPORATION,	)	Honorable
Defendant-Appellant	)	James K. Donovan,
Cross-Appellee.	)	Judge Presiding.

WELCH, J., dissenting:

I approve of the reasoning of the majority with the single exception that I do not find Johnson v. John F. Beasley Constr. Co. (1984), 742 F.2d 1054, requires the conclusion plaintiff was not a "seaman."

In Johnson, the plaintiff's employer was building the new lift section and control house of a railroad bridge over the Illinois River. The plaintiff was the foreman of the crew constructing the lift section and control house over water from a barge. The barge had no motive power of its own and no steering, and was pushed to its position by a tugboat. Plaintiff and his crew assisted with holding and preparing lines to shore.

In Johnson, the plaintiff was hardly more than a passenger on the barge. He did almost nothing for the barge itself. His crew used it as a platform from which to construct a bridge. In the case at bar, plaintiff's duties concerned the operation of the crane which was affixed to and part of the vessel on which he was stationed. He was on the vessel not because it was a convenient place to stand, but because the functions of the vessel required that someone of his

qualifications be there to ensure that the vessel continued to serve its functions.

I believe that this plaintiff does come within the "transportation function" test in Johnson. The instant vessel was two barges welded together with a mounted crane. The plaintiff's job was repair, reassembly and maintenance of the crane portion of the vessel. If plaintiff's work were not done, there would be no reason for the vessel to go anywhere as the unit would be inoperative and of no use. Plaintiff's duties made him an essential member of the crew of the vessel, and he was entitled to the same protection as any seaman.

I conclude plaintiff in the case at bar "made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel" (742 F.2d 1054, 1063), and I therefore dissent.

Filed September 30, 1986

No. 5-85-0377

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOHN DUNGEY,	)	Appeal from the
	)	Circuit Court of
	)	St. Clair County.
Plaintiff-Appellee,	)	
Cross-Appellant,	)	
vs.	)	No. 83-L-128
UNITED STATES STEEL	)	
CORPORATION,	)	Honorable
Defendant-Appellant	)	James K. Donovan,
Cross-Appellee.	)	Judge Presiding.

O R D E R

This cause having been considered on plaintiff-appellee, cross-appellant's petition for rehearing and the court being fully advised in the premises:

IT IS THEREFORE ORDERED that plaintiff-appellee, cross-appellant's

petition for rehearing shall be, and the same hereby is, DENIED.

FILED November 7, 1986

ILLINOIS SUPREME COURT

SUPREME COURT BUILDING

SPRINGFIELD, IL 62706

February 6, 1987

No. 64515 - John Dungey, petitioner, v. United States Steel Corporation, respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on March 2, 1987.

IN THE CIRCUIT COURT

TWENTIETH JUDICIAL CIRCUIT

ST. CLAIR COUNTY, ILLINOIS

JOHN DUNGEY,)

Plaintiff,)

vs.) No. 83 L 128

UNITED STATES STEEL)

CORPORATION,)

Defendant.)

ORDER

This cause coming before the Court; the Court being fully advised in the premises and having heard testimony from witnesses in open court; after considering the oral and written arguments of Counsel, and the written legal memorandums and suggested instructions on the law; the court makes the following findings:

Plaintiff brings this lawsuit in two Counts: Count I alleging a violation of the Jones Act and Count II alleging that the vessel in question was not seaworthy.

Plaintiff is a member of International Union of Operating Engineers Local No. 520 and was employed by the defendant, United States Steel Corporation. The plaintiff was assigned as an oiler to work on Ringer Barge Number 2. The vessel consisted of two barges welded together on which a Ringer crane was mounted on girders and beams which were welded to the deck of the barges. The Ringer crane was used by defendant in the Mississippi River to aid in construction of a span of the new Jefferson Barracks Bridge. As a general rule, the barge was moved in and out of the channel daily. Movement generally was accomplished by use of a tugboat, although the Ringer barge was capable of maneuvering on the river, both up and down stream and laterally by use of a combination of winches and anchors and did so on a limited number of occasions.

When in the channel or on other

parts of the river, stationary position of the Ringer barge was accomplished by the use of anchors and spud beams. The spud beams were set by the Ringer crane.

The regular crew of the Ringer crane was five iron workers, one operator, a master mechanic, an oiler (plaintiff) and the foreman, Gene Jensen. The workers were brought to the Ringer barge each day by a tugboat from the shore and remained on the barge for the entire day. The barge had a tool shed, a crew shack and a portable restroom. The crew ate their noon meals on the barge.

The plaintiff's duties as an oiler related entirely to the maintenance and servicing of the ringer crane. He would assist in the movement of the barge only to the extent that the crane placed and moved the spuds. Plaintiff was permanently assigned to the barge and his only work place was the barge, which was primarily

in the navigable stream. The primary function of the barge was to operate as a crane. The plaintiff's primary function was to maintain the Ringer crane.

On December 5, 1982, Ringer Barge Number 2 broke loose from her anchors and wrecked some 4 miles downstream. Plaintiff and the rest of her crew were on the boat during this accident. The accident damaged the crane's boom and on December 30, 1982, the plaintiff was instructed by Gene Jensen to clean out the pin holes on the boom carriage in preparation for the boom to be reattached to the Ringer crane. The plaintiff mounted the supporting girders and stood on them to clean one pin hole. When moving from one pin hole to the next, plaintiff walked the girders and beams and hit a slick spot that he thought was frost, and fell to the steel deck.

The evidence indicated that plaintiff was not issued a safety belt and lifeline.

There was no direct evidence of frost, the plaintiff described his foot sliding as sliding like it was on ice. Mike Mort, an iron worker, testified that he did not see any frost but that he did not look in the area in which plaintiff fell. He further testified that the area in which plaintiff fell was usually covered with grease and oil.

The Court will first consider whether the plaintiff is entitled to recovery under the Jones Act as described in Count I of his Complaint.

The Mississippi River meets the navigability test of admiralty jurisdiction due to the public navigable character of the water.

The Court has determined that the evidence substantiates a finding that the barge that the plaintiff was working on was a "vessel" within the meaning of the Maritime laws. Federal Jury Practice and Instructions, 3rd Edition

by Devitt and Blackmar states in Section 96.04 vessel - defined.

"The primary meaning of the term vessel is that of any water craft or other contrivance used or capable of being used, as a means of transportation on water.

The term vessel also -includes, however, various special purpose craft whcih do not operate as vehicles for transportation but rather as movable, floating basis for stationary operation such as drilling or dredging. If a structure is buoyant and capable of being floated from one location to another, it may be found to be a vessel even though it may have remained in one place for a long time, and even though there are no plans to move it in the foreseeable future."

The Court also feels that the barge in this case qualifies as a vessel under the test outlined in Johnson v. John

F. Beasley Construction Company, 742 F.2d 1054 (7th Circuit, 1984) at page 1063 and 1064.

In determining whether the plaintiff in this case was a seaman, the Court has relied on the case of Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Circuit, 1985) at page 384. The Court in Tullos adopts the reasoning of Offshore Company v. Robinson, 266 F.2d 769 (5th Circuit, 1959) where the following test was adopted: 1) That the worker was permanently assigned to or did a substantial portion of his work on a vessel, including special purpose structures not usually employed as a means of transport by water but designed to float on water; and 2) The work he performed contributed to the function of the vessel, or to the accomplishment of it's mission, or to the operation or welfare of the vessel in terms of it's maintenance.

The court finds:

1. That the plaintiff was permanently assigned to the vessel, Ringer Barge Number 2;

2a. The work plaintiff performed contributed to the function of Ringer Barge Number 2;

2b. The work performed by plaintiff contributed to the accomplishment of the mission of Ringer Barge Number 2 which was the construction of a bridge;

2c. The work plaintiff performed contributed to the operation or welfare of the vessel in terms of the maintenance to the Ringer crane, which was mounted on Ringer Barge Number 2.

In addressing the issue of defendant's negligence, the Court has closely considered the testimony and exhibits offered and received, and has reviewed with great interest plaintiff's exhibit number 10, American Bridge Safety Manual. Defendant's safety manual on page 1

indicates that the following safety guides have been developed to prevent accidents. The foreword goes on to state "it is the foreman who has the greatest burden of responsibility in putting the rules into practice. Men should expect that he will give them the benefit of his knowledge and insist on strict compliance." The Court has reviewed the entire manual with regards first to the aspect to safety guide lines when working above ground. The following safety rules, although all are not directly on point with the facts of this case, assist the Court in determining a standard of care in this case.

> Section 1.4: When working a loft, all men must tie off their safety lines, except while getting from one point to another. This includes connectors when it is necessary for them to use any tool other than one spud wrench to make a connection and when working off scaffolds at large points. If special provisions are required to provide a safe place for tying off, it should

be planned in advance of the operation, with the approval of the construction superintendent. Do not fasten safety line over sharp edges. Wherever possible, tie up your safety line before getting on any type of scaffolding. Safety lines should be tied as short as possible and to a point above the level of the workmen. Safety lines, whenever possible, should be tied to the structure and not to floating lines. See general rules and "safety rules and requirements for scaffolds".

Section 7.1: The members of the detail gang are in no way accepted from following the rules of others working aloft. This includes keeping tied off whenever possible.

Section 12.1: Install fixed wire rope in the hopper or other structure so that men can tie safety lines to it.

Section 12.8: Wherever possible, workmen are required to tie off their safety lines before getting onto scaffolds and remain tied off until they are off the scaffold and have secured footing.

Section 15.22: Always tie up your safety line on such operations. If no members are convenient for attaching the safety line, string a piece of cable of proper size between two adjacent members and tie

> the safety line to the same. Allow sufficient sag. See table on page 8 of Safety Rules and Requirements for Scaffold.

Although each of these sections do not apply directly to the job plaintiff was working on, it emphasizes the importance placed by defendant on safety belts and tying off when working aloft.

Defendant in this case failed to supply the plaintiff with the appropriate safety equipment; failed to instruct the plaintiff on the performance of his duties; and failed to monitor or supervise the performance of plaintiff's duties in accordance with reasonable safety standards.

The Court finds that defendant's negligence was a proximate cause of plaintiff's injury. Borras v. Sea Land Service, Inc. 586 F.2d 881 (1st Circuit 1978), Litherland v. Petroleum Offshore Construction Services, Inc., 546 F.2d 129 (5th Circuit 1977).

Regarding the issue of contributory negligence, a seaman's duty to protect himself is not ordinary care, but slight care. Brooks v. Great Lake Dredge-Dock Company, 754 F.2d 536 (1984). Based on the facts in this case, the Court does not feel that the above standard of care has been breached, and that any verdict awarded to the plaintiff should not be reduced as a result of his conduct.

Before reaching the issue of damages, the Court will next address Count II of plaintiff's Complaint which deals with seaworthiness. The Court has previously found that the Mississippi is a navigable waterway; that the barge that plaintiff was working on was a vessel for purposes of the Maritime laws; and that the plaintiff falls within the definition of seaman as provided for in the Maritime laws.

Debit and Blackmar provides in Section 96.13 liability of ship owner for

unseaworthiness;

> Under Maritime law, every ship owner or operator owes to every member of the crew employed aboard the vessel the non-delegable duty to keep and maintain the ship, and all decks and passageways, appliances, gear, tools, and equipment of the vessel, in a seaworthy condition at all times. To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used, for the purpose or use for which provided or intended. An unseaworthy condition may result from the lack of adequate crew, a lack of adequate manpower to perform a particular task on the ship, or an improper use of otherwise seaworthy equipment. Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the ship owner or operator is liable for all injuries and consequent damages proximately caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage."

The Court again makes reference to plaintiff's Exhibit Number 10,

defendant's safety manual. The following sections appear pertinent to the condition of the vessel:

> Section 2.1: Keep working areas in clean and orderly condition with necessary equipment and material neatly arranged. Use bolt baskets or other containers provided. Do not allow drift pins, bolts, pieces of permanent material, or any such articles to lie loose on the structure, planks or scaffolds.
>
> Section 2.5: Grease and oil spots on planking or anywhere on the structure, as well as around machinery, should be eliminated or removed.
>
> Section 2.6: In winter weather, keep walkways, steps, planking and other work areas free of snow and ice. Supply of salt should be available.
>
> Section 2.21: When members may be slippery due to grease, oil, wet paint, frost or ice, remove the foreign material so far as possible and take other necessary precautions.
>
> Section 9.24: Engines, compressors, or other equipment must not be permitted to drip oil or grease on the structure.
>
> Section 13.5: All gang ways, ladders, stairways and passages must be kept free of ice, snow

and grease.

> Section 13.10: Decks of barges, boats, etc. must be kept clean of unnecessary tools and materials. Lines must be coiled, tools stored and materials stacked clear of working spaces.

Not all of the above sections apply directly to plaintiff and defendant's conduct in this specific case, but they are important to the evaluation of Count II of plaintiff's Complaint. From the circumstantial evidence provided in the testimony of plaintiff and Mike Mark, the Court can infer that plaintiff's work area was in an unseaworthy condition. The Court finds that there was a proximate cause relationship between the unseaworthy condition and plaintiff's injury and that plaintiff's conduct did not amount to contributory negligence.

In determining damages, the Court will first consider the aspect of future lost wages. The Court first notes that neither party presented any expert

testimony with regard to the issue of estimating future lost wages. In an attempt to determine such a figure, the Court is guided by Justice Stevens opinion for a unanimous United States Supreme Court in the case of Jones and Laughlin Steel Corporation v. Pfeifer, 76 2d 768 (1983).

The Court will first attempt to define the actual wage of the plaintiff. In cross-examination of the plaintiff, defense counsel elicited by adding the W-2 forms of the plaintiff for 1982 a gross age of $27,429.80. Plaintiff deducted $503.00 in work related expenses. The resulting figure would be $26,926.80.

Whether fringe benefits should be included in the actual wage of the plaintiff, was a recurring issue in the case. The fringe benefits were not reflected in the W-2's. Regarding this issue the Court in Jones and Laughlin Steel Corporation v. Pfeifer states:

"In addition, the worker may have enjoyed certain fringe benefits, which should be included in an ideal evaluation of the worker's loss, but are frequently excluded for simplicity sake." Footnote 12 at 76 Lawyers Edition 2d page 781 indicates "these might include insurance coverage, pension and retirement plans, profit sharing and inkind services." Plaintiff's exhibit 19, which is the union contract between Local 520 and the Southern Illinois Contractors Association in article 26 page 32 indicates that the employer agrees to contribute 87 cents on straight time hours to the Employers and Operating Engineers Local 520 Health and Welfare Fund, and that the employer agrees to contribute $1.51 to the Employers and Operating Engineers Local 520 Pension Fund for straight time hours worked. The total of these two figures is $2.38. The Court has chosen to exclude the other fringe benefits

referred to in the union contract because they do not directly benefit the employee.

Mr. Dungey worked approximately 2,000 hours in 1982, which would result in an annual fringe benefit of approximately $4,760.00.

Rounding off, the Court is using an estimate annual wage of $31,500.00.

In this case the Court finds that the plaintiff would have continued to work until the age of 62 if he had not been injured. (13 1/2 more years).

Judge Stevens in Jones and Laughlin Steel Corporation v. Pfeifer, supra, stated "we do not suggest that the trial judge should imbark on a search for delusive exactness. It is perfectly obvious that the most detailed inquiry can at best produce an approximate result." The Court went on to state "we are satisfied that whatever rate the District Court may choose to discount the estimated stream of future earnings, it must make

a deliberate choice, rather than assuming that it is bound by a rule of state law." The Court previously indicated in it's opinion that a discount rate may not be necessary if there are sufficient offsetting factors. In referring to Carlson, Economic Analysis v. Courtroom Controversy, 62 ABA Journal 628 (1976) the Court stated: "He thus recommended that the estimated loss of future wages be calculated without considering either price inflation or societal productivity gains. All that would be considered would be individual seniority and promotion gains. If this were done, he concluded that the entire market interest rate, including both inflation and the real interest rate, would be more than adequately offset."

The evidence in this case indicated that the plaintiff had accumulated a substantial amount of seniority within Operating Engineers Local Union No. 520.

His seniority ranking could only increase as time went on. As the result of seniority, he is allowed preference in choosing specific jobs available, and of course he would be allowed to work more hours than any member with less seniority. In the Jones case, Justice Stevens indicated "with the passage of time, an individual worker often becomes more valuable to his employer. His personal work experience increases hourly contribution to firm profits. To reflect that heightened value, he will often receive seniority or experience raises, merit raises, or even promotions. Although it may be difficult to prove when, and whether, a particular injured worker might have received such wage increases, they may be reliably demonstrated for some workers."

In this case it is certain that Mr. Dungey's seniority rights would increase. As a result of this, he would

have a greater opportunity to increase his wage rate and the number of hours he worked as his time in the Union increase.

In this case the Court feels the evidence regarding the plaintiff's employment allows the Court to conclude that the entire market interest rate, including both inflation and the real interest rate, would be more than adequately offset. Thus, the Court has multipled $31,600.00 by 13.5 years and reached a figure of $426,600.00.

The next issue is whether the amount should be reduced by any anticipated future earnings of the plaintiff. Defendant supplied extensive testimony with regards to the work skills of the plaintiff and his potential "vocational rehabilitation". The Court does not share the optimism of the witness that testified regarding the future employability of the plaintiff. The

plaintiff's age, physical condition, educational and vocational skills do not make him a prime candidate for a high paying "light duty" job. The Court does feel that Mr. Dungey is physically and vocationally prepared to obtain some sort of employment. Mr. Dungey's work record indicates a man who has worked steadily throughout his life, and the court is sure that he will make a good faith attempt ~~in the future~~ to continue to seek employment in the future. The Court is not confident that the plaintiff will receive what might be termed a "full-time, good paying job". The Court has calculated that a full-time job at minimum wage ($3.35 times 2,000 hours) would result in an annual income of $6,700.00. The court feels it reasonable to conclude that the plaintiff will earn a minimum of $6,700.00 per year until his retirement in either a full-time or part-time position. Thus, the Court

will reduce the award by $90,450.00, which was determined by multiplying $6,700.00 by 13.5 years.

Regarding the tax effect on both the present and future aspects of the Court's award, the Court feels that the tax factors will offset each other. In reaching this conclusion, the Court feels that in addition to the factors previously discussed, that the Court chose a conservative work life of 13.5 years as opposed to 16.5 years or higher, and also the fact that the award has been reduced by potential future earnings.

The Court will next address the issue of medical bills. The Court in this case was faced with the complex problem of deciphering what appears in many instances to be conflicting medical testimony. The Court finds that based on the testimony presented, that the plaintiff's neck, lower back and the right ulnar neuropathy at the elbow were

causally connected to the accident in question in this case. In reviewing plaintiff's exhibit number 25 the Court received a total of $22,641.08 in medical expenses. The Court reduces that amount by $772.84, which is the June 14, 1983 St. John's Mercy Medical hospital bill; June 14, 1983 anesthesiologist bill of $225.00; subtract $101.00 from the July 7, 1983 anesthesiologist bill; subtract $386.42 from the July 18, 1983 St. John's Mercy Hospital bill. The total reduction would then be $1,484.84, leaving an amount of $21,156.24.

Dr. Jacob's bill was submitted at $16,265.00. That amount is reduced by services he performed on June 14, 1983 in the amount of $1,901.00 and the services on July 7 in the amount of $832.00, leaving a total of $13,532.00. The pharmacy bills were approximated at $812.85. The Court has reduced that figure to $600.00.

The medical bills proximately

connected with the accident in this case amount to $35,288.24.

The Court has calculated the lost wages for a period of two years and four months and arrived at a figure of $73,628.00.

The plaintiff in this case testified as to the pain and discomfort that he has and presently suffers and the testimony indicates he will continue to suffer in the future. Difficulty in sleeping, inability to sit or stand for extended periods of time, constant discomfort or pain resulting in continued medication, limitation of movement and the resulting restrictions on every day life. The balance of the Court's award is consideration for past, present and future pain, suffering, discomfort and the resulting restriction on plaintiff's ability to enjoy life.

Defendant's affirmative defense based on plaintiff's acceptance of

workmen's compensation benefits is denied based on the case of Radford v. Webb, 596 F.2d 1205 (4th Circuit, 1979).

WHEREFORE, the Court enters judgment in favor of the plaintiff on Counts I and II of plaintiff's Complaint in the amount of Six Hundred and Fifty Thousand Dollars ($650,000.00) plus costs of court.

Filed May 10, 1985

_____
ASSOCIATE CIRCUIT JUDGE
JAMES K. DONOVAN

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DUNGEY,
Petitioner,

vs.

USX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a member of a bull gang repairing a crane, which will operate from a barge, a "seaman" for purposes of the Jones Act, where the assignment is temporary and most of the work is done on land?

2. If bull gang membership at the time of injury is insufficient for seaman status, is the bull gang member nonetheless a Jones Act seaman by virtue of his prior employment as a crane oiler on a ringer barge, where his only duties were to maintain the crane and he had no responsibility that related in any way to the navigability of the barge?

LIST OF PARTIES

The parties to the proceedings below were petitioner John Dungey and USX Corporation under its prior name, the United States Steel Corporation. The name change occurred on July 9, 1986. USX Corporation is respondent before this Court. The less than wholly-owned subsidiaries of USX Corporation are listed in the Appendix at A-1 and A-2.

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No. 86-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DUNGEY,
Petitioner,

vs.

USX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

The respondent USX Corporation respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Appellate Court of Illinois, Fifth District, in this case. That opinion is reported at 148 Ill.App.3d 484, 499 N.E.2d 545 (1986).

STATEMENT OF THE CASE

Petitioner John Dungey in 1982 was a heavy equipment oiler and a member of Local 520 of the Operating Engineers. An "oiler" is responsible for the lubrication and fueling of construction machinery, including hoisting cranes. In late August of 1982, he was hired out of the union hall by respondent USX Corporation, then known as U.S. Steel Corporation, to work

on the construction of the Jefferson Barracks Bridge, which spans the Mississippi River south of St. Louis. Dungey was assigned to Ringer Barge #2, which consisted of a ringer crane supported by two barges welded together. A ringer crane is a hoisting crane mounted on a large horizontal ring. The ring permits the crane to turn 360 degrees.

When the crane was operational, Dungey's only duties — in practice and by contract — were to maintain the crane and assist its operator. (Tr. 584-85, 658-60). The crane was similar to those Dungey worked on when hired out to construction projects on land; his job responsibilities did not differ in any way from his usual land-based construction assignments. During the period the crane was operational, a tugboat would take Dungey and the rest of the work crew out to the crane each morning and bring them back each evening. In addition to the oiler, the work crew consisted of an ironworker foreman, the operating engineer who ran the crane, and five ironworkers. Upon arrival at the barge, the operating engineer and the oiler would attend the crane while the ironworkers, for the most part, worked upon the bridge structure.

The barge supporting the crane had no motive power of its own. It had no navigational equipment or lights. It was secured by anchor cables and spuds. When it had to be moved, it was pushed by tugboats. (Tr. 65-67). The barge did not transport any steel on the water. Supply barges brought steel out to the ringer barge and the ringer crane would lift the steel from the supply barge to the bridge superstructure. (Tr. 923-924, 1018-19).

On December 5, 1982, approximately three months after Dungey began work on Ringer Barge #2, the barge pulled loose of its moorings on the north side of the bridge and the crane collided with the bridge, severely damaging the boom. Consequently, the crane was inoperable and there was no need for Dungey's services as an oiler. (Tr. 122-23).

Dungey at that point could have gone back to the union hall and taken another oiler job. But he elected to hire out as an "operator" with a "bull gang" assembled to fix the crane. A bull gang employed to repair a crane consists of four ironworkers and four operators. Union rules permitted Dungey to join the bull gang as an operator at a rate of pay higher than his oiler pay. Some members of the bull gang had been members of the ringer barge work crew, others had not. (Tr. 583-84, 933-35, 939).

After December 5 the ringer barge was moved to shore for repairs by the bull gang. (Tr. 933). All repair work was done on shore until late December, when the barge was moved to a shallow part of the river north of the bridge for the attachment of the reconstructed boom to the crane. (Tr. 936, 941-42). On December 30, 1982, the bull gang boarded the barge to place the boom back on the crane. It was while cleaning the pin holes where the boom was to be connected to the crane — and as a member of the bull gang — that Dungey fell approximately six feet from the crane to the floor of the barge. Dungey applied for and received Illinois Workmen's Compensation benefits for his injuries.

REASONS FOR DENYING THE WRIT

Petitioner Dungey urges this Court to grant his petition for a writ of certiorari because the decision of the Illinois Appellate Court, Fifth District, "conflicts with decisions by this Court interpreting the application of the Jones Act and emphasizes conflicting standards in the United States Courts of Appeal." Petition for Writ of Certiorari ("Petition") at 11. In response, USX respectfully submits, first, that the decision below does not conflict with prior decisions of this Court. Second, the "conflict" which Dungey alleges among the courts of appeals is limited, and more one of emphasis than result. This Court has already denied certiorari in at least two prior cases urging the same purported conflict. Third, even if the Court thought the alleged conflict was now worthy of its attention, this case is not the appropriate vehicle to resolve any disagreement about the definition of a Jones Act seaman. It involves a unique factual context that may prevent the Court from reaching the question Dungey urges it to review. Indeed, resolution of the alleged conflict is unlikely to affect the result below.

I. There Is No Conflict With Prior Decisions Of This Court

The Illinois Appellate Court, Fifth District, held that on December 30, 1982 — the date of his injury — Dungey was not a "seaman" within the meaning of the Jones Act, 46 U.S.C. §688.

> It simply seems illogical that an essentially land-based worker, an oiler, a member of the operating engineers union, whose only duties were the oiling of the crane situated on the barge and subsequent repair of the boom of the crane after it was damaged, could be considered a seaman and member of the crew of a vessel. He performed no work in connection with the transportation function of the barge, which we here assume to be a vessel in navigation.

Appendix to Petition for Writ of Certiorari ("App.") at A-31 to A-32.

The appellate court carefully reviewed prior decisions of this Court. It noted the correspondence between a Jones Act "seaman" and a "member of a crew of any vessel" under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901-950 (as amended). Congress placed the "master or member of a crew of any vessel" outside the LHWCA's compensatory scheme, *see* 33 U.S.C. §902(3)(G), precisely because such a "seaman" is protected by the Jones Act and general maritime law. This Court has treated the Jones Act "seaman" and the LHWCA's "member of a crew of any vessel" as synonymous, and therefore cases interpreting the latter phrase are relevant to Jones Act analysis. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *see Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957).

This Court's leading case on the meaning of "seaman" or "member of a crew of any vessel" is *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940). *Bassett* held that a laborer whose work on a lighter consisted principally of facilitating the flow of coal onto steamboats was not a "member of a crew of any vessel." It held that "members of a crew of any vessel" are "those employees on the vessel who are naturally and primarily on board to aid in her navigation." *Id.* at 260. The Court concluded that

> the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted, and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as "in the position of longshoremen or other casual workers on the water."

Id. at 260, quoting *Scheffler v. Moran Towing & Transportation Co.*, 68 F.2d 11, 12 (2d Cir. 1933).

Bassett was followed some years later by *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). At the time he was injured, Senko was employed as a handyman and responsible for maintaining a dredge. The jury had returned a verdict for Senko under the Jones Act and the Illinois Appellate Court, Fourth District, reversed, finding insufficient evidence that Senko was a "seaman."

This Court reinstated the jury verdict. It concluded that there was "sufficient evidence in the record for the jury to decide that petitioner was permanently attached to and employed by the dredge as a member of its crew."

> Petitioner's witnesses testified that he was known as a "deckhand" among rivermen. They said that he was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge "in shape." This testimony indicated that substantially all of petitioner's duties were performed on or for the dredge. A normal inference is that petitioner was responsible for its seaworthiness. If the dredge leaked, for example, the jury could suppose that his job would be to repair the leak. Furthermore, a witness testified that a usual duty of one holding petitioner's job was to take soundings and clean navigation lights when the dredge was in transit.

Id. at 372-73. The *Senko* Court concluded:

> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that *he would have a significant navigational function when the dredge was put in transit,* we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew.

Id. at 374 (emphasis added).

Thus, as the Illinois Appellate Court noted below, *Senko* and *Bassett* both recognized that there must be a nexus between the duties of the individual and the "navigability" of the vessel, *i.e.*, it's ability to transport men and material across water. This is a broad standard, but not without limit. In his position as an oiler and later as a member of the bull gang, Dungey had no responsibility or duty that related in any way to the navigability of the barge. The result below is consistent with the teachings of *Bassett* and *Senko*.

Dungey argues that *Bassett* and *Senko* were undercut by three per curiam opinions in the late 1950's. In each case the Court held that there was an evidentiary basis for a jury finding of seaman status, and reversed the court of appeals' decision holding the plaintiff was not a seaman as a matter of law. Each majority opinion is delphic, with no discussion of the underlying facts. In at least two of the cases, however, there is some indication that the injured or deceased employee had some navigational function with respect to the vessel at issue. In *Texas Co. v. Gianfala,* 222 F.2d 382, 384 n. 2 (5th Cir.), *rev'd,* 350 U.S. 879 (1955), a case which Dungey characterizes as "directly controlling," Petition at 15, the decedent was responsible for pumping the barge out and floating it for movement to different job sites. Upon arrival at the new job site, he would then flood the barge to stabilize it at the new location. The decedent in *Harris v. Whiteman,* 243 F.2d 563, 564 (5th Cir. 1957), *rev'd sub nom. Butler v. Whiteman,* 356 U.S. 271 (1958), cleaned the engine room boilers.

In the third case decided per curiam by this Court, the district court opined that there was a factual question whether the plaintiff was a seaman, but concluded that he had an exclusive remedy under the Defense Bases Act and dismissed his Jones Act claim. The district court never decided the seaman issue or submitted it to the jury. A divided court of appeals held that

the plaintiff's action was not barred by the Defense Bases Act, but the panel majority then held as a matter of law that the plaintiff was not a seaman and affirmed on that basis. *Grimes v. Raymond Concrete Pile Co.*, 245 F.2d 437 (1st Cir. 1957), *rev'd*, 356 U.S. 252 (1958). The Supreme Court reversed and remanded to the district court, holding "that the petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel." *Id.* at 253. The facts related in the court of appeals' opinion and the Supreme Court dissent are too sketchy to permit any conclusions as to the petitioner's navigational role. The opinions refer to petitioner's work on a barge immediately before his injury, but do not describe the nature of that work.

There is nothing in *Gianfala, Butler,* and *Grimes* that undercuts the requirement that the Jones Act seaman have some navigational function.[1] The thrust of these three per curiam opinions was directed elsewhere. They were attempts to correct a perception in the lower courts that if the testimony was undisputed, the question of seaman status should be taken away from the jury and decided by the courts as a matter of law. The per curiam reversals emphasized that even if there is no credibility issue, "seaman" status is a mixed question of law and fact, like negligence, and committed to the jury's discretion, as long as their determination has some reasonable basis. As the *Senko* Court observed:

> Our holding [in *Bassett*] that the determination of whether an injured person was a "member of a crew" is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The

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[1] *See also Roper v. United States*, 368 U.S. 20, 24 n. 3 (1961) ("those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness"); *West v. United States*, 361 U.S. 118 (1959) (same).

> essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.

352 U.S. at 374.

There is no corresponding issue in this case as to the appropriate role of judge and jury. At Dungey's insistence, this case was tried to the court. In the federal system, appellate courts under the "clearly erroneous" standard have substantially more latitude to review factual findings of a trial court than those of a jury. *See, e.g., United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). And certainly the standard of review of Illinois appellate courts is not an issue of concern, let alone a matter for review, in this Court. In sum, there is nothing in the appellate court's decision itself that is inconsistent with prior decisions of this Court or that would otherwise warrant review.[2]

II. The Ostensible Conflict Between The Fifth And Seventh Circuits Is Limited And Not Squarely Presented By The Facts Of This Case

As the appellate court noted below, *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), inspired a tripartite test for seaman status under the Jones Act: "(1) that the vessel be in navigation; (2) that plaintiff have a more or less permanent connection with the vessel; and (3) that plaintiff be aboard primarily to aid in navigation." App. A-11, citing *Carumbo v.*

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[2] The Petition implies that the appellate court's holding is somehow inconsistent with *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). Dungey suggests there is significance in the Court's observation that workers on floating platforms are "seamen" if "permanently attached to the vessel as crewmembers." *Id.* at 416-17 n. 2. Of course, the *Herb's Welding* quotation begs the question in this case: Was Dungey permanently attached to the ringer barge as a crewmember? Consequently this dicta in *Herb's Welding* does not advance Dungey's analysis.

Cape Code S.S.Co., 123 F.2d 991 (1st Cir. 1941). These early cases recognized that "navigation is not limited to 'putting over the helm.' " *Norton v. Warner Co.*, 321 U.S. 565, 572 (1944). "[O]ne is aiding in navigation even though he happens to be a cook or an engineer." *Carumbo*, 123 F.2d at 995. But there must be some substantial nexus with the movement of the vessel. It was the absence of such a nexus that prompted the appellate court to hold that Dungey was not a Jones Act seaman.

Dungey in the circuit and appellate courts relied on *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). In *Robison* the Fifth Circuit attempted to divine the significance of the per curiam opinions of *Gianfala, Butler* and *Grimes* in a case involving a roughneck on a mobile drilling platform. The Fifth Circuit concluded that the effect of these cases was to water down the "aboard primarily to aid in navigation" requirement to a test that conferred seaman status on an individual

> if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Id. at 779.

Dungey contends, and the appellate court acknowledged, this standard is more liberal than that adopted by the Seventh Circuit in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). *Johnson* criticized the *Robison* standard as "too broad in that it accords insufficient weight to the relationship between the employee and the *transportation function* of the vessel." *Id.* at 1061 (emphasis in original). It faulted the Fifth Circuit for attempting to read too much into *Gianfala, Grimes* and *Butler*, and ignoring the *Senko* Court's emphasis on the employee's

navigational tasks. The Seventh Circuit concluded "it is the employee's relation to the transportation function of the vessel, *i.e.*, whether the employee contributes to the maintenance, operation, or navigation of the vessel as a means of transport on water, that is critical for Jones Act purposes." *Id.* The court held that an ironworker, assigned to and injured on a crane barge, was not a seaman. Although he may have occasionally thrown or fastened mooring lines, he did not make "a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Id.* at 1063.

Dungey argues the *Johnson* standard conflicts with that of the Fifth Circuit in *Robison,* and this conflict warrants granting his petition. Even if this case presented the Court with an appropriate vehicle for resolving this purported conflict, it would still not be worthy of certiorari. First, the alleged conflict is limited. No circuits outside the Fifth and Seventh have had occasion to apply the *Robison* standard in light of *Johnson.* To the extent circuits outside the Fifth have attempted to identify seamen under the Jones Act, they appear to adhere, consistent with the Seventh Circuit, to the "in aid of navigation" requirement of *Senko* and *Bassett. Robison,* at least as Dungey interprets it, is not the "majority approach." Petition at 13.[3]

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[3] *See, e.g., Salgado v. M.J. Rudolph Corp.,* 514 F.2d 750, 755 (2d Cir. 1975); *Simko v. C&C Marine Maintenance Co.,* 594 F.2d 960, 964-65 (3d Cir.), *cert. denied,* 444 U.S. 833 (1979); *Caldwell v. Ogden Sea Transport, Inc.,* 618 F.2d 1037, 1050 (4th Cir. 1980); *Searcy v. E. T. Slider, Inc.,* 679 F.2d 614, 616 (6th Cir. 1982); *Craig v. M/V Peacock on Complaint of Edwards,* 760 F.2d 953, 956-57 (9th Cir. 1985).

In *Presley v. Healy Tibbits Construction Co.,* 646 F.Supp. 203 (D.Md. 1986), for example, the district court considered the Jones Act status of a pile driver who was hired out of the Pile Drivers' Union to clear trenches in Baltimore harbor. He was assigned to a crane barge, but unlike Dungey, the employee did have some incidental assignments related to the movement of the barge. The district court held the employee was not a seaman because his duties did not serve

Second, there is some question how different the *Johnson* and *Robison* standards are in practice. Even in *Robison* the Fifth Circuit cited Robison's importance to the navigability of the platform. As the appellate court observed below:

> *Robison* may be distinguished from the instant case in that Robison's duties aboard the drilling platform, capable of floating as a vessel, unlike Dungey's duties here, "contributed to her mission, to the operating function she was designed to perform as a sea-going drilling platform. Some of Robison's duties had a 'significant navigational function,' like Senko's [*Senko v. LaCrosse Dredging Corp.* (1957), 352 U.S. 370, 77 S.Ct. 415, 1 L.E.2d 404] in that they related to the seaworthiness, maintenance (welfare) of Offshore No. 55. Some of his duties . . . are traditional [*sic*] duties of seamen in that they related to the movement of the vessel as a means of transport on water."

App. at A-16 to A-17, quoting *Offshore Corp. v. Robison*, 266 F.2d at 779. At least one lower court expressly applying *Robison* has required crane operators on floating platforms to prove something more than operation and maintenance of the crane to establish seaman status. *McSweeney v. M. J. Rudolph Corp.*, 575 F.Supp. 746 (E.D.N.Y. 1983). *See also Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir. 1984) (commercial diver is seaman because diver "embodies the traditional and inevitably maritime task of navigation").

The current conflict between the Fifth and Seventh Circuits appears to be more one of dicta and emphasis than inconsonant holdings in factually similar case . While abjuring a strict "in

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naturally and primarily as an aid to navigation. "He was on board as a pile driver and only incidentally did he assist in the movement of the barge from one location to another. Furthermore, the pile driving work which he was performing was not itself in aid of navigation. Rather, it was directed toward maintaining landbased utility lines." *Id.* at 205-06.

aid of navigation" requirement in cases such as *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 383 (5th Cir. 1985), the Fifth Circuit has in fact tightened other aspects of *Robison's* test for seaman status. *See, e.g., Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523 (5th Cir. 1986) ("work barges" not within Jones Act definition of vessel), *cert. denied,* 107 S.Ct. 1309 (1987); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1076 (5th Cir. 1986) (en banc) (Barrett not seaman because he "did not perform a substantial portion of his work aboard a vessel or fleet of vessels"); *Prinzi v. Keydril Co.*, 738 F.2d 707, 710 (5th Cir. 1984) (member of drilling crew not "seaman" because his "work concerned not the barges that the drilling rig rested upon, but the rig itself"). It may be because the purported conflict is one more of rhetoric than results that this Court has already denied petitions for certiorari in two cases that directly raised the *Johnson-Robison* conflict, including *Johnson* itself. *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir. 1986), *cert. denied,* 107 S.Ct. 939 (1987); *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert denied,* 469 U.S. 1211 (1985).[4] The ostensible conflict is no more pronounced now — arguably less so given cases such as *Waguespack, Barrett,* and *Prinzi.* It is certainly no more worthy of this Court's attention.

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[4] These are only two of at least eight occasions since the 1980 Term in which the Court has declined invitations to review the defintion of a seaman under the Jones Act. *See also Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied,* 464 U.S. 1069 (1984); *Berry v. American Commercial Barge Lines,* 114 Ill.App.3d 354, 450 N.E.2d 436 (1983), *cert. denied,* 465 U.S. 1029 (1984); *Reed v. Diamond M Drilling,* 712 F.2d 1414 (5th Cir. 1983), *cert. denied,* 464 U.S. 1043 (1984); *Mellon v. John F. Beasley Construction Co.*, 661 F.2d 924 (4th Cir.), *cert. denied,* 454 U.S. 1033 (1981); *Crador v. Louisiana Dept. of Highways,* 625 F.2d 1227 (5th Cir. 1980), *cert. denied,* 452 U.S. 915 (1981); *Bazile v. Bisso Marine Co.*, 606 F.2d 101 (5th Cir. 1979), *cert. denied,* 449 U.S. 829 (1980).

III. This Case Does Not Properly Present The Issue Of The Jones Act Status Of Construction Workers Operating Or Maintaining Construction Machinery On Floating Platforms

Dungey's petition is vague about the question he is asking this Court to consider. His "question presented" does not incorporate any specific facts of this case. The implication in his references to *Gianfala, Grimes* and *Herb's Welding* is that the only issue is whether a crane oiler on a floating construction platform is a seaman under the Jones Act. But the factual context of this case is more complicated, because Dungey was not working as an oiler at the time he was injured. He was part of a bull gang assembled specifically for the purpose of repairing the crane. He was not required to join the bull gang as a result of his prior employment as an oiler on the ringer barge. Indeed there were no oiler jobs on the bull gang. Dungey was hired onto the bull gang as an operator at a rate of pay *higher* than his hourly rate as an oiler.

The appellate court did not consider the significance of Dungey's involvement with the bull gang because it found that even as a crane oiler, Dungey was not a seaman. But this Court is not limited to the grounds relied on by the appellate court. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977); *Dandridge v. Williams,* 397 U.S. 471, 475 (1970); *Langnes v. Green,* 282 U.S. 531, 538-39 (1931). If certiorari is granted, the unique facts of this case may mean that the Court will not reach the questions of the vitality of the "in aid of navigation" requirement and the seaman status of construction workers on floating platforms. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959). It may simply conclude that at the time of his injury, Dungey was a ship repairer, analogous to a harbor worker or longshoreman, and within the terms of the LHWCA — not the Jones Act.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), this Court, in an opinion by Justice Jackson, held that seaman

status under the Jones Act depends upon "the activity in which [the employee] was engaged *at the time of injury.*" *Id.* at 190 (emphasis added). In *Desper* the decedent was employed by the defendant during the summer months as a motorboat operator on the Illinois River. During the winter, his duties consisted of maintaining and repairing the defendant's motorboats for the upcoming season. The employee was killed when a fire extinguisher exploded on a moored barge where he was painting life preservers for use on the boats. The Court concluded:

> To be sure, [the decedent] was a probable navigator in the near future, but the law does not cover probable or expectant seamen but seamen in being. It is our conclusion that while engaged in such seasonal repair work Desper was not a "seaman" within the purview of the Jones Act.

Id. at 190-91.

When Dungey was injured, he was a member of an ad hoc repair crew. There was a distinct break in Dungey's employment as an oiler. He got a new job: different responsibilities with a new crew at a higher wage rate. Most of the bull gang's work was done on land. Lower courts, including the Fifth Circuit, have concluded that employees who repair vessels are not usually Jones Act seamen. In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), the Fifth Circuit held that an electrician, whose contacts with vessels were limited to performing vessel repairs, was not a seaman within the meaning of the Jones Act. The court noted that a ship repairer is expressly covered by the LHWCA as a result of the 1972 amendments to that Act. Therefore, he cannot be a Jones Act seaman, even if he spent a substantial portion of his time aboard a recognized fleet of vessels performing electrical repairs.

Dungey's repair work was even farther removed from the traditional work of a seaman, because the bull gang repaired the crane, not the barge that was supporting it. "[A] sensible and practical distinction can be and is drawn between repairs that

can be and are likely to be made by seamen during the course of a voyage and repairs the nature and extent of which make them beyond the area of a seaman's normal responsibility." *Bryant v. National Transport Corp.*, 467 F.2d 139, 140 (3d Cir. 1972), citing *Desper, supra. See also Berry v. American Commercial Barge Lines*, 114 Ill.App.3d 354, 450 N.E.2d 436, 442 (1983) ("[t]he proper rule . . . is that whether a plaintiff acted 'primarily in aid of navigation' at the time of his injury is a jury question if the plaintiff was a repair or maintenance worker who was directly connected with keeping a vessel in navigation or preparing it to retain navigational capacity"), *cert. denied*, 465 U.S. 1029 (1984).

In addition to the work the employee was doing at the time he was injured, some lower courts, including the Fifth Circuit, have suggested that the type of work he did before and after his injury is relevant to, but not determinative of, his seaman status. Other factors include the duration of the new assignment, its relationship to the employer's business, "whether the employee was free to accept or reject it without endangering his employment status and any other factors relevant to the ultimate inquiry." *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 453 (5th Cir. 1980). It is certainly not clear that the Fifth Circuit in weighing these factors — or any other court of appeals — would find the determination Dungey was not a Jones Act seaman "clearly erroneous" under the peculiar facts of this case.

CONCLUSION

The decision of the Illinois Appellate Court for the Fifth District comports with prior decisions of this Court. Although Petitioner argues that the holding below "emphasizes conflicting standards in the United States Court of Appeals," it is not at all clear that any court of appeals confronted with the same facts would have reached a different conclusion about Petitioner's seaman status. In any event, this case does not squarely present the conflict Petitioner urges the Court to resolve, and resolution of that conflict is unlikely to change the result below. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

The less than wholly-owned subsidiaries of USX Corporation are:

Athlone Prospecting & Development Corporation, Ltd.
First National Bank (Albion, PA)
Alfa Produtos Metalurgicos, Ltda.
ITW Mapri (51% owned by Alfa Products)
Companhia Siderurgica Paulista "Cosipa"
Merinds Mineracao (Partnership)
Mineracao Buritirama Ltda.
Mineracao Cárajas, Ltda. (Partnership)
Mineracao Maraba, Ltda. (Partnership)
Mineracao Xingu, Ltda. (Partnership)
Termerid Mineracao, SA
Torremco Soc. Min. E Com. Ltda. (Partner)
DeepSea Ventures, Inc.
Ocean Mining Associates - Joint Venture
Industria de Tubos y Perfiles, S. A. (Intupersa)
USS-POSCO Industries - Partnership
Sidbec-Normines, Inc.
U. S. Steel France
Compagnie Miniere de l'Ogooue (Comilog)
Feralloys, Ltd.
Zeerust Chrome Mines, Limited
USS Technology (Japan) Ltd.
ACE Holdings, Ltd.
Coda Holding, Ltd. (CODA-H)
Corporate Officers & Directors
Assurance, Ltd. (CODA)
Adela Investment Company, S.A.
Altos Hornos de Vizcaya, S. A. (AHV)
Associated Manganese Mines of South Africa, Ltd.
Associated Ore & Metal Corporation, Ltd.
Avsteel SWA, Ltd.
Blue Grass Phosphate Company

Chrome Deposit Corp. (Court Holdings J. V.)
Kappa Mining & Prospecting Co., Ltd.
La Pointe Iron Company
Navios Shipping Corp.
Oresteel Investments (Proprietary), Ltd.
Prieska Copper Mines (Pty.) Ltd.
Sigma Mining & Prospecting Co. (Pty.) Ltd.
Societe Des Mines De Fer De Guinee Pour L'Exploitation Des Monts Nimba (Mifergui Nimba)
Terninoss Acciai Inossidabili - S.p.A.
Tilden Iron Mining Company
West Union Canal Company, The
Zuari Agro Chemicals Ltd.
Bartow Chemical Products
Century III Associates
Fort Meade Chemical Products
Double Eagle Steel Coating Co. - Joint Venture
Live Oak Uranium Operations
Rockland Joint Venture (Cost-Sharing)
RMI Company
Tenn-USS Chemicals Co. - Joint Venture
Worthington Specialty Processing
Arctic LNG Transportation Company
Badger Pipe Line Company
City Point Oil Terminal, Inc.
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Deutsche Transalpine Olleitung GmbH
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited

Petroleum Terminals, Inc.
Pilot Oil Corporation
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
West Shore Pipe Line Company
Wolverine Pipe Line Company
Acadian Gas Pipeline System
Bayou Interstate Pipeline System
Calcasieu Gas Gathering System
Louisiana Industrial Gas Supply System
Neches Pipeline System
Pelican Interstate Gas System
Pelican Transmission System
Pontchartrain Natural Gas System
Spindletop Gas Distribution System
Alabama Intrastate Supply
Red River Pipeline Corporation
Ozark Finance Corporation